In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 199

GABRIEL DIAZ, RAY BAKER, JOHN FANNON AND RONALD VINCENT PECCIA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 16–17) is reported at 341 F. 2d 912.

JURISDICTION

The judgment of the court of appeals was rendered on February 23, 1965. A petition for rehearing was denied on April 30, 1965. The petition for a writ of certiorari was filed on May 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was improper for the government to introduce evidence that a codefendant identified peti-

tioner Diaz by another name in relation to one of the transactions involved in the indictment.

2. Whether it was reversible error for the trial Judge to direct a judgment of acquittal as to one defendant on one count without informing counsel for the others of his intention to do so before they made their summations to the jury.

3. Whether it was error to admit into evidence against petitioners Baker and Fannon, as bearing on their intent, testimony regarding another transaction in which they were involved which was of the same character as that charged in the indictment.

STATEMENT

Petitioners were convicted after a trial by jury of conspiracy to transport in interstate commerce counterfeit Shell Oil bonds. Diaz was also found guilty of two substantive offenses of transporting counterfeit bonds and Baker and Peccia of one such offense (R. 38–40). Diaz and Baker were given concurrent sentences of imprisonment for three years; Peccia was sentenced to imprisonment for one year and a half on one count, and probation on the other; Fannon was sentenced to imprisonment for two-and-a-half years (R. 96–100).

The evidence showed that Cohen, an attorney in New Orleans (who was acquitted), approached one Marder, a Miami public relations man, for help in disposing of Shell Union Oil bonds for a client (R. 146–148). On December 17, 1960, Marder and Cohen flew from New Orleans to Miami with the clients, petitioners Diaz and Peccia (who used the name

"Lay") (R. 148–151). Peccia gave Marder 12 Shell Union Oil bonds in Miami (R. 151–152, 155). Peccia was asked to leave the bonds in escrow, but, after making telephone calls to New Orleans and Chicago, he refused to do so (R. 158–160, 444–445, 462). Marder was allowed to keep the bonds, but he could not arrange a sale and sent the bonds back to Cohen in New Orleans (R. 160–161).

In late December 1960, Cohen told Leo Heymann, a New Orleans attorney, that he had a Cuban client named Menendez who wished to sell a large number of bonds (R. 178–181), but that money would first have to be raised because the bonds had to be picked up in Chicago (R. 180–181). Heymann was subsequently introduced to petitioner Diaz, who was identified as the client (R. 181, 183–184). Heymann was given eleven Shell bonds (R. 181–182, 187, 248–249), shown at the trial to be counterfeit (R. 276–289, 290–296), which he pledged in order to raise money.

On January 6, 1961, Heymann, Cohen and Diaz flew from New Orleans to Chicago. At the airport, Cohen told Heymann to buy the ticket for "Menendez" under the name of G. Diaz (R. 185). Diaz registered in his own name at the motel in Chicago (R. 226, 690).

In Chicago, it took two days for Diaz to obtain the bonds. During this time he made telephone calls to Baker, who was in Kentucky (R. 186–190, 308–312). On January 8, Diaz showed Heymann a laundry sack of the O'Hare Inn containing 146 Shell bonds (R. 193–194). Heymann gave Diaz $2,500 for the bonds, which Heymann was to hold as security until

a sale could be arranged in Florida (R. 195–196). When Diaz left the hotel later that day, he told the desk clerk that he could be reached at Room 320 of the O'Hare Inn (R. 468–471), a room occupied by Baker on January 7 and 8 (R. 414–419).

Heymann and Cohen flew to Miami Beach, Florida (R. 196–197). Diaz was in Miami Beach from January 8 to January 10 (R. 302) and Baker from January 8 to January 11 (R. 325–332). Seventy-five of the bonds were sold to a Mrs. Harris (R. 201, 210, 436–437), who later turned them over to the F.B.I. (R. 439). The other seventy-one were recovered from Heymann (R. 211, 269–270). These 146 bonds were also shown to be counterfeit (R. 276–289, 290–296).

In May 1960, Fannon, using the name John Brown, bought a $2,400 camera, which was repossessed after two months (R. 357–361, 382). A bartender, who shared quarters with Fannon in Chicago, testified that Fannon once showed him some Shell Union Oil bonds (R. 554, 556). The bartender overheard a conversation among Fannon, Peccia, and another concerning a trip by Peccia and Baker from Chicago to New Orleans for the purpose of making "a deal with a Gabriel Diaz" concerning some bonds (R. 500–503). In December 1960, Baker gave some money to a friend with directions to send Peccia to New Orleans (R. 508, 549–550). Subsequently Peccia told the bartender that he had given a few bonds to Diaz, but could not get any money; that he and Diaz had flown to Miami, but that nothing had happened (R. 510–511).

With a *caveat* by government counsel that it bore only on the question of their knowledge and intent (R. 616), evidence was introduced against Baker and Fannon regarding a shipment of counterfeit bonds from Chicago to New York which they had arranged (R. 610–675).

ARGUMENT

1. There is no merit to petitioners' argument that the government improperly introduced evidence that petitioner Diaz had used the name "Menendez." Heymann testified that Cohen had told him that Cohen had a client (whom Heymann later met) named Menendez who wished to sell bonds, and he subseqently testified that he was told to buy the tickets to Chicago in the name of Diaz. The government itself introduced evidence that Diaz used his own name on the flight from New Orleans to Chicago (R. 406), and from Chicago to Miami (R. 405); that he registered in the name of Diaz in Chicago (R. 469); and that he registered under the name of Diaz in Miami in January 1961 (R. 302). There was thus no attempt to insinuate that Diaz had personally used an alias, but the testimony did establish that Cohen had used some name other than Diaz in initially referring to Diaz. Indeed, petitioner Diaz did not object to the admission of the testimony regarding Cohen's identification of the owner of the bonds or seek any limiting instruction since it apparently was part of his defense to assert that Menendez and Diaz were different people, and that Diaz was only acting on behalf of Menendez, who was the real owner of the bonds (R. 227–228).

Petitioners also complain because the government introduced against Cohen, who was a codefendant, statements made by Cohen to the F.B.I. (R. 687–691, 696–700), including his assertions that he had received a call from a Mr. Menendez who said he was a Cuban refugee and wanted to dispose of bonds, and that Menendez used the name Lay when he registered in Miami on the December trip. Cohen also told the F.B.I. that when he travelled with Heymann and petitioner Diaz from New Orleans, Menendez used the name Diaz and registered at the Chicago hotel as Diaz (R. 690). These were statements which Cohen had made, and they were admissible against him. Cohen's mention of the name of Menendez was only an incidental part of the detailed account which Cohen gave concerning his connection with the counterfeit bonds. Moreover, the government offered the statements only against Cohen (R. 685), and the judge instructed the jury that the statements were to be considered only against that defendant (R. 685–686).

2. The court originally denied motions of all defendants for judgments of acquittal. After the closing arguments to the jury, when counsel for Diaz objected to certain remarks which government counsel had made in his summation regarding Cohen, the judge stated that he would dismiss count 1 as to Cohen. He subsequently instructed the jury to bring in a verdict of not guilty on count 1 as to Cohen (R. 744–745, 766–767). It does not appear from the record whether the judge changed his mind after first denying a motion for a judgment of acquittal—which

was clearly a permissible course—or whether he initially intended to dismiss that charge. In any event, there is no reason to believe that counsel for petitioners would have argued differently to the jury had they known that Cohen would be acquitted on count 1. The fact that the judge apparently believed that Cohen did not know the counterfeit character of the bonds does not suggest that petitioners, who were in a different position, were not aware of their counterfeit nature.

3. The testimony admitted against Baker and Fannon with respect to the New York transaction related to dealings during the same period of time and involved the same type of bonds as were involved in the charges on trial. The testimony was properly admitted to show intent and knowledge. *United States* v. *Leitner,* 312 F. 2d 107 (C.A. 2); *Carrullo* v. *United States,* 184 F. 2d 743 (C.A. 8); *Marson* v. *United States,* 203 F. 2d 904 (C.A. 6).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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